Law and Memory

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Hanna Arendt warned that the fragile truth of historical facts was vulnerable not only to being forgotten but also to manipulation (Arendt, Human Condition, Chicago University Press 1958, p. 232). However, she was probably not referring to a necessity to introduce so-called memory laws, which represent an attempt by governments to legally preserve the memory of the past. The adoption of such legislation is closely connected with the phenomenon of transitional justice, which involves the legal accountability of fallen regimes and their officials. Examples of this type of regulations include lustration laws. However, "memory laws" are a much broader category, encompassing a wide array of laws from acts penalizing genocide denial, through bans on insulting the state or bans on the use of symbols of totalitarianism, to parliamentary declarations about the legal qualification of a given historical event. There is no clear definition of memory laws, and their categorization suggested in literature is also far from rigid. Despite this ambiguity, there is no doubt that the existence of memory laws impacts not only the legal situation of individuals and groups, but also – if not above all – shapes the historical narrative of a given place and community. These narratives are increasingly codified in criminal law provisions.

Holocaust denial – a lie different than any other?

Those who strongly oppose legally regulating historical truth do not make an exception for regulations penalizing the propagation of Holocaust denial. As Timothy Garton Ash argues, a more efficient method for opposing the lies spread by David Irving (a prominent Holocaust denier) was confronting him with undeniable evidence of the existence of gas chambers during his court case against the American Holocaust historian, professor Deborah Lipstadt (who herself had also voiced support for the decriminalization of Holocaust denial), than the conviction and incarceration of Irving in Austria, which to the contrary enabled him to pose as a "martyr of free speech" (Garton Ash, Free Speech: Ten Principles for a Connected World, Yale University Press 2016, p. 158).

On the other hand, this perspective overlooks the essence of the problem with Holocaust denial: in the overwhelming majority of cases, this denial has anti-Semitic, racist roots. Hence, the reason for introducing legislation prohibiting denialism is to prevent the proliferation of such hateful attitudes. Genocide denial may in fact constitute a mechanism for stirring up hate and excluding minorities by stigmatizing them as liars who have fabricated their suffering. Scholars who research the phenomenon of genocide and its preceding circumstances also argue that the denial of a crime is a risk factor for its repetition and constitutes one of the successive stages of the "genocide process". Nevertheless, the current debate on criminalization of negationism continues to be riddled with disputes. The most significant point of contention is the legal bans on the denial of crimes other than the Holocaust. The problem was clearly visible in the frequently criticized judgment of the Grand Chamber of the European Court of Human Rights in *Perincek v. Switzerland*. In an act of legal contortion, the Court ruled it would be impossible to equate

Holocaust denial with the denial of the massacre of Armenians committed by the Ottoman Empire at the beginning of the 20th century.

Difficult dilemmas

In 2008, a letter signed by European intellectuals and scientists protesting the introduction of memory laws, known as the *Appel de Blois*, received a lot of attention. The authors of the letter asked legislators to recognize that "while they are responsible for the maintenance of the collective memory, they must not establish, by law and for the past, an official truth whose legal application can carry serious consequences for the profession of history and for intellectual liberty in general".

The *Appel de Blois* pinpointed one of the key issues in the debate on memory laws – the possible restriction of freedom of expression, including the freedom to conduct scientific research. The UN Human Rights Committee also draws attention to this aspect of such regulations and considers laws that prohibit the expression of an erroneous opinion or an incorrect interpretation of the past incompatible with the universal standard of protection of freedom of expression.

It is worth adding that the appeal originating in France was not coincidental: in recent years, French legislators have adopted probably the most extensive body of legislation regulating discussion about history. Alongside the Gayssot Act, which criminalizes the public expression of Holocaust denial, there was also an act declaring the massacre of Armenians was a genocide, and the Taubira Act, identifying slavery as a crime against humanity.

This brief catalogue alone could be seen as sufficient proof of the complicated and controversial nature of most memory laws. It shows the lack of precision in their provisions, the arbitrary nature of the legal qualification of certain acts and the dilemma as to the timespan memory laws should cover. How far back into history should we reach in order to fulfill the task of remedying past injustices as proposed by the advocates of such laws? Another point of contention that causes strong opposition today is the existing and planned regulations intended to protect "the good name of the state and country". Most states and nations are not eager to admit to their own faults and reckon with the painful past. However, it seems that only governments deeply concerned about uncovering the past and that lean towards nationalist and xenophobic tendencies feel compelled to make official declarations about their own heroism.

A network of memory: Poland, Ukraine, Russia

Different complications also arise at the intersection of conflicting memory laws introduced by countries in disagreement over the interpretation of their common past. This is well illustrated by the example of Poland, Ukraine, and Russia. Russian law protects the memory of the heroism and victorious role of the Soviet army and its soldiers in World War II and prohibits the propagation of information to the contrary. Conversely, the Ukrainian legislature introduced regulations stating the joint responsibility of Nazis and Soviets for World War II and protect the good name and honor of the heroes of the Ukrainian struggle for independence, including soldiers of the Ukrainian Insurgent Army.

From both the historical and contemporary point of view of the Polish state, those memory laws are extremely problematic as the role of the Soviet Union in the invasion, occupation, and destruction of Poland as well as the Polish people during World War II is unambiguous. In turn, the Ukrainian regulations that commemorate national history (i.e. the struggle of the Ukrainian Insurgent Army) do not mention events like the Volhynia massacre, a stance which will not be accepted in Poland. Similarly, the Polish parliamentary declarations in the form of acts legally qualifying the events in Volhynia as genocide are rejected by the Ukrainian side.

It would appear that these theoretical considerations have an impact on the actual legal situation of individuals. For instance, the first judgements convicting people accused of desecrating the memory of the Great Patriotic War have already been passed in Russia. These regulations also impact the diplomatic relations between countries, deepening the divides between nations. Most important from the perspective of protecting individual rights and freedoms is that memory laws are inconsistent with the international standards for the protection of freedom of expression. In the cases described above, it is difficult to maintain that the memory laws are meant to prevent conflicts or the proliferation of hatred on grounds of ethnicity or race. It is equally difficult to argue such rules are supposed to protect the memory of the victims of past crimes – unless this memory is understood in an extremely selective way as referring only to a strictly defined group of victims, determined by their nationality and belonging to a given community.

Dangerous memory games

Despite the aforementioned problems, memory laws are not only becoming increasingly frequent features of the legal landscape, but are also a part of “memory politics” – the use of historical codes, myths, and figures of traitors and heroes in the pursuit to gain citizens’ votes. In many ways, this is not a surprising phenomenon – governments usually claim the right to regulate the largest possible number of areas of social life, including ones that lie beyond the mandate given to them in the general elections.

In their most dangerous forms, memory laws play the role of not only the guardians but also the inquisitors of a strictly defined historical narrative. In this narrative, “our” ancestors are featured solely as victims of evil and treachery and never as those who perpetrate or are complicit in the crimes of the past. When used in this manner, instead of perpetuating the memory of the past, memory laws falsify it. They do not prevent the repetition of tragic events but instead pose a threat of further misery.

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